

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ZEMENCO, INC.,  
Plaintiff

v. CIVIL ACTION NO. 03-175 ERIE

DEVELOPERS DIVERSIFIED,  
Defendant

STATUS CONFERENCE

Proceedings held before the HONORABLE  
SEAN J. McLAUGHLIN, U.S. District Judge,  
in Judge's Chambers, U.S. Courthouse, Erie,  
Pennsylvania, on Wednesday, December 15, 2004.

APPEARANCES:

ERIC P. REIF, Esquire, (via Phone), appearing on  
behalf of the Plaintiff.

W. PATRICK DELANEY, Esquire, appearing on behalf  
of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

2

1 PROCEEDINGS

2

3 (Whereupon, the proceedings began at 9:00 a.m., on  
4 Wednesday, December 15, 2004, in Judge's Chambers.)

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6 THE COURT: All right, counsel, I don't care which  
7 one of you starts to fill me in, what's going on here that you  
8 needed me to get involved?

9 MR. DELANEY: Judge, this is a case where you issued  
10 an amended case management order back in September that called  
11 for dispositive motions to be resolved, I think, by early  
12 December or to be filed by early December.

13 MR. REIF: On November 20th.

14 THE COURT: Was that the first filing deadline for

15 dispositive motions, November 20th?

16 MR. REIF: That is correct.

17 MR. DELANEY: I think Mr. Reif's pretrial as the  
18 plaintiff was due on the 10th of December. There's been a  
19 development that I thought made sense to talk with you about.  
20 That is that this case revolves around the disposition of a  
21 piece of property on upper Peach --

22 THE COURT: Mandy Lane.

23 MR. DELANEY: Right. Zemenco has now gone to state  
24 court and has asked for a Board of Viewers under the original  
25 condemnation action that was instituted -- I think in 2000,

3

1 Eric?

2 MR. REIF: I believe that's right.

3 MR. DELANEY: I was not the lawyer with that, but I  
4 believe that's the correct date. They have the right to do  
5 that, I didn't know that, for up to six years.

6 THE COURT: I thought that state thing was over?

7 MR. DELANEY: I did, too, until this all happened.

8 But they're ripe for up to six years after the government pays

9 you, you can ask for a Board of Viewers saying you want more

10 money. Well, they've done that.

11 THE COURT: How much were you paid, Mr. Reif?

12 MR. REIF: The initial payment, your Honor, was

13 \$287,000.

14 THE COURT: That's hardly a drop in the bucket,

15 right?

16 MR. REIF: Well, that's correct. But your Honor

17 knows how valuable that property is in this corridor.

18 THE COURT: His Honor has never seen it. I'll take

19 your word for it.

20 MR. REIF: I simply mean the remaining property with

21 all the development, this 46-acre parcel which borders Peach

22 Street and I-90. It's one of the last remaining undeveloped

23 tracts in that area.

24 THE COURT: I was being facetious, I know the

25 general area of what you're talking about up there. But, in

1 any event, let's get back to the Board of Viewers.

2 MR. DELANEY: The Board of Viewers is supposed to

3 meet and examine the property today. But I wonder whether

4 they'll actually do that.

5 THE COURT: What do they do, what's their charge?

6 MR. DELANEY: They're to look at the property and

7 declare what the value of the loss to Zemenco was, I believe,

8 and Mr. Reif can correct me.

9 MR. REIF: Your Honor, the process is, and I am not

10 an expert with regard to Board of Views. One of my partners,

11 Tony Basinski, is handling that aspect of the case.

12 THE COURT: Is he there?

13 MR. REIF: He is not. He's actually up for the

14 viewing today, it's my understanding that's going forward.

15 THE COURT: Armed with what little knowledge you

16 might have about the Board of Viewers, tell me what your

17 understanding is?

18 MR. REIF: I certainly understand the procedure.

19 Your Honor, the difference between the District Court case and

20 the Board of View proceeding is that, one, what happened in

21 this case is when the property was condemned initially, what

22 Summit Township did, based upon the appraisal Pat had obtained

23 from an appraiser by the name of Sammartino, simply volunteered

24 the amount contained in his report as an appraisal value for  
25 the 46 acres that had been condemned as part of this Mandy Lane

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1 road construction.

2 THE COURT: Is that the \$250,000 or whatever?

3 MR. REIF: \$287,000. Under the statute that

4 pertains to these actions, Mr. Delaney is correct, there is

5 then a fairly long period of time to challenge that as being

6 adequate or accurate, and the way that is done is to request

7 that the Board of View be appointed. Now, the procedure is

8 that the Board of View, which has been appointed to inspect the

9 property, and then the Board of View actually conducts a

10 hearing at which expert testimony is presented. At that

11 hearing Mr. Zafiropoulos himself, the owner, could testify.

12 But traditionally that's done on the basis of expert testimony.

13 And we certainly plan on proceeding with an expert. Now, the

14 Board of View makes an award and the parties can either -- the

15 challenging party can either accept that amount or there is the

16 right to appeal that and actually have a full-blown jury trial

17 in the Court of Common Pleas where the whole valuation issue is

18 addressed again.

19 THE COURT: And then on to the Commonwealth Court, I  
20 presume?

21 MR. REIF: Yes, that could occur. That is the  
22 procedure. Now, the distinction here is that with regard to  
23 the condemnation or Board of View proceeding, the entire issue  
24 is the fair market value of the entire property, not just half  
25 an acre, but the entire tract immediately before the taking and

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1 unaffected by the prospect of the taking. And the fair market  
2 value of the remaining property immediately after the taking.  
3 And the distinction between those damage issues and the damage  
4 issues in this case are that here in the District Court, for  
5 example --

6 THE COURT: I understand the distinction, Mr. Reif,  
7 I know exactly what's going on in District Court. I appreciate  
8 what you've educated me on so far which I needed. But, as I  
9 understand it, what's going on here is you had a bargain  
10 hammered out for what you thought was around \$3.8 million or  
11 \$3.9 million. Developers, then, I guess you concluded that

12 they were in material breach, is that right?

13 MR. DELANEY: Yes, and terminated --

14 THE COURT: And terminated the agreement. Here's my  
15 question to first Mr. Reif. Regardless of how this shakes out  
16 in the Board of Viewers, and let's assume that the Board of  
17 Viewers ultimately awards some dough that is in excess of what  
18 Mr. Sammartino awarded --

19 MR. REIF: Yes.

20 THE COURT: That, of course, that's not on a  
21 parallel track to this. Would that serve as some type of  
22 offset for your damages in federal court?

23 MR. REIF: Your Honor, I don't believe it would be  
24 an offset. But my suggestion is this, and Mr. Delaney and I  
25 have discussed this. His thought was, well, why don't we

1 simply stay the District Court action because depending upon  
2 what the Board of Viewers does, that may help resolve all of  
3 the litigation. And, your Honor, it's important to realize  
4 here, and I don't know if your Honor is aware of this fact, but  
5 because of an agreement entered into by Developers Diversified



6 and Summit Township during the development of the Peach Street  
7 Square shopping center and the actions relating to the  
8 condemnation and the Mandy Lane portion of property that  
9 Developers wanted condemned, they have entered into an  
10 indemnification agreement with Summit Township. So, for  
11 example, Developers paid the \$287,000. They are also on the  
12 hook for any attorney's fees or any additional payments made as  
13 part of this Board of Viewer proceeding. So all of the money,  
14 to the extent that any money is forthcoming in either the  
15 District Court action or the Board of View proceeding, will  
16 come from Developers. And my thought there was this. The  
17 damage issues are distinct. But it seems to me that perhaps  
18 this would make sense, and this is just a suggestion that I  
19 have.

20 THE COURT: All right.

21 MR. REIF: In the District Court action we would  
22 proceed to, at least I file our pretrial statement, which would  
23 define the damage issues before your Honor. And then agree to  
24 stay the action at least until the Board of Viewers has reached  
25 a conclusion. Perhaps with whatever amount of money is

1 involved in that, then through your Honor or a third-party  
2 maybe, we could sit down and try to mediate or conciliate this  
3 to see if we could wrap up everything.

4 THE COURT: All right, let's go off the record right  
5 here.

6 (Discussion held off the record.)

7 THE COURT: Back on the record. Go ahead.

8 MR. DELANEY: I was just saying off the record that  
9 I found the case confusing because I don't see the distinction  
10 between the claims in District Court and the claims in the  
11 condemnation proceeding.

12 THE COURT: Let's do it this way. Let's roll it all  
13 the way back. First of all, tell me, articulate for me what  
14 you think the nature of the claim is before me, and then tell  
15 me what you think the nature of the claim is there and why they  
16 are not distinct?

17 MR. DELANEY: All right. It was my view that the  
18 plaintiff had pled and seem to respond to discovery by  
19 indicating that the plaintiff had two causes of action or two  
20 theories of recovery. One as a breach of contract -- you

21 terminated this \$3.9 million contract to buy my property, and  
22 you did it improperly and I want the benefit of the bargain.  
23 Now, the difficulty with that is that the contract that was  
24 supposedly breached by my client when they declared the  
25 termination contains a limitation of damage clause that says if

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1 we breach, you get the amount of money that is sitting in  
2 escrow, which I think is \$20,000. And that's the limitation on  
3 your damages. And then I thought, well, they've made other  
4 allegations here --

5 THE COURT: Contract?

6 MR. DELANEY: It relates to contract. But it's  
7 essentially a fraud in inducement. You entered into this  
8 contract never intending to perform. Trying to dupe us into  
9 giving an easement for Mandy Lane, and when that failed, you  
10 went to Summit Township and convinced them to condemn the  
11 property and you now owe us damages.

12 THE COURT: Which purely is a legal matter if true,  
13 would nullify the effect of that limitation of damages clause?

14 MR. DELANEY: It does. But then you have two

15 problems. One, the Third Circuit recognizes and the Supreme

16 Court recognizes a privilege for any person or entity

17 petitioning government for any reason. We've pled that.

18 THE COURT: First Amendment?

19 MR. DELANEY: Essentially. Akin to the

20 Noerr-Pennington privilege in an antitrust case. Secondly, if  

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21 there's a fraud inducement, if the grand conspiracy failed,

22 what have they lost. They've lost the property that's been

23 condemned. The value of which is going to be established by

24 the Board of Viewers. And that seems to be almost a collateral

25 estoppel. So when Mr. Reif and I began talking about

10

1 scheduling, I said, well, I really do need to file this

2 dispositive motion, I want to file a dispositive motion on my

3 privilege issue under Noerr-Pennington on fraud of inducement.  

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4 I want to file a dispositive motion on limitation of damages if

5 you're claiming a breach of contract. I have asked Mr. Reif in

6 the past what are the damages, what damages are different here

7 than what you're claiming in the condemnation proceeding. And

8 he has consistently indicated that they are different, but I

9 don't know what they are.

10 MR. REIF: Your Honor, let's address that issue

11 briefly, if I may. First of all, with regard to dispositive

12 motions, we have a pretrial order that required any such

13 motions be filed by the 20th. And Mr. Delaney in discussions,

14 and I have made it clear to him and included it in a letter,

15 that we were not agreeing to waive any deadline. Moreover,

16 with regard to the dispositive motions, and we can view the

17 facts differently, I think that in terms of what I understand

18 the applicable law to be, Developers has a problem in the sense

19 that several months ago I served them with 30 or 35 requests

20 for admissions. That for some reason they overlooked or missed

21 the deadline and they have never been answered. So with regard

22 to the dispositive motion issue, I think we can clear that

23 hurdle.

24 But more importantly, your Honor, with regard to

25 what is distinct in the damage claims, even if you simply look

1 at our complaint, we are entitled to recover any damages that

2 naturally would flow from the breach. It's not simply the loss  
3 of the benefit of the bargain. To cite two or three examples.  
4 Categories of damage that are entirely different -- addressed  
5 the Board of View proceeding, are things such as continued debt  
6 service on the property. The condemnation of that particular  
7 parcel of land. The effect also of eliminating the sales bond,  
8 that Zemenco had to display these manufactured housing models  
9 which get sold as part of its development on the property. And  
10 at the time the condemnation occurred there were 36 or 39 units  
11 in place. The plan for that property called for as many as in  
12 excess of 150 units all together and the land is there. But  
13 the number of experts that deal with the development of these  
14 types of properties will tell you that it is absolutely  
15 essential to have a sales lot on-site to develop those  
16 manufactured housing developments properly and successfully.  
17 So that wiped out that ability and that creates a category of  
18 damages where you have, among other things, lost rentals that  
19 would be achieved or reasonably could be achieved by having  
20 additional units in place.

21 The other thing that happened, your Honor, is that  
22 because Zemenco's development of the property was stopped dead  
23 in its tracks when the property was condemned and no closing

24 occurred, the rentals -- the rental payments that are  
25 generated, monthly rentals by having 36 to 39 units, is not

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1 adequate to service the debt on the property or has not been  
2 adequate. So what has happened to Zemenco since the  
3 declaration of default was declared in 1999 by Developers, is  
4 at the time, and Mr. Delaney has these numbers because Mr.  
5 Zafiropoulos testified to them when he was deposed, at the time  
6 the total debt on the property, as I recall, was something in  
7 the range of \$800,000. Today it's \$1.8 million. And Zemenco  
8 simply had to obtain additional moneys and additional loans to  
9 try to hold on to the property.

10 THE COURT: On this subject of limitation of damages  
11 provision in this contract, what do you make of that?

12 MR. REIF: Your Honor, I do not think under the  
13 circumstances in this case and this argument is greatly  
14 bolstered I think by the admissions we have, by their failure  
15 to respond to the request for admissions, but I recognize that  
16 the general case law is that those clauses are generally  
17 enforceable. But there is a line of case law, I can't cite the

18 cases to you off the top of my head, that basically stand for  
19 the proposition that these liquidated damage provisions however  
20 are not enforceable if the liquidated damage amount is grossly  
21 out of proportion to the damages.

22 THE COURT: Let me interrupt you for just one  
23 second, so I make sure I'm tracking you. Is this a truly  
24 liquidated damage provision or limitation of damage clause?

25 MR. DELANEY: It's a limitation of damage clause.

13

1 It contains the words liquidated, but it's a limitation of  
2 damage clause.

3 THE COURT: I'm sorry, Mr. Reif, go ahead.

4 MR. REIF: But there is a line of case law that  
5 stands for the proposition that those clauses, of course, have  
6 to be looked at in each of, each individual factual setting.  
7 To over generalize, these are not enforceable in the  
8 limitation, not only to the proportion of damages that may be  
9 incurred by the party that supposedly is subject to these and  
10 the breaching party is well aware of that, when the breach  
11 occurs.



12 Now, in this case, your Honor, the whole reason for  
13 the declaration of the default was the claim by Developers that  
14 Zemenco had an absolute obligation to agree to the extension of  
15 both Downs Drive and Mandy Lane. There is absolutely no  
16 reference in his agreement to Mandy Lane. And the fact of the  
17 matter is Developers negotiated both the agreement with Nick  
18 Scott that refers to Mandy Lane and, also, based upon their  
19 testimony, when we deposed their corporate representatives in  
20 Ohio, conceded that they played a role in drafting the  
21 Scott-Zemenco agreement, and knew exactly what language was in  
22 there. Now, their only explanation is, well, he should have  
23 known that because the applicable paragraph also talks to road  
24 development in conformance with the Summit Township  
25 transportation plan. Well, more recently, your Honor, we

14

1 deposed Mr. Sterrett, who's the engineer --

2 THE COURT: If I could interrupt you just a second,  
3 Mr. Reif. I'm flipping through the complaint as you're talking  
4 to me, there is a specific reference in the agreement to Mandy  
5 Lane. It says Developers agrees to construct --

6 MR. REIF: Bear with me, just a minute, your Honor.

7 THE COURT: Paragraph 13 of the complaint. Then I  
8 want to ask you a question. Indented paragraphs seven and  
9 eight, paragraph 12 of the complaint.

10 MR. REIF: What that is referring to, your Honor, is  
11 the language in the January 11, 1999 development agreement  
12 which Summit entered into or, I'm sorry, Developers entered  
13 into with Summit Township. That is not our agreement.

14 THE COURT: All right. Let me ask a question about  
15 this. Is there anything in your agreement that -- is there  
16 anything in your agreement that references either directly or  
17 by implication this Mandy Lane business?

18 MR. REIF: It's our position, your Honor, it does  
19 not. Because, first of all, Mandy Lane is not referenced  
20 anywhere. Secondly, with regard to the transportation plan,  
21 the fact of the matter is nobody could ever figure out what  
22 that transportation plan provides, based upon Mr. Sterrett's  
23 deposition.

24 THE COURT: Mr. Reif, hold your thought one second.  
25 Off the record.

1 (Off the Record.)

2 THE COURT: Go ahead.

3 MR. REIF: What I was going to explain to you very  
4 simply is that we recently had the depositions of the township  
5 people who were represented by Mr. Sennett. The transportation  
6 plan doesn't even --

7 THE COURT: What's the transportation plan?

8 MR. REIF: Summit Township has a transportation  
9 plan, a basic transportation plan for the development of its  
10 road system. In connection with the development of the Peach  
11 Street Square shopping center, certain amendments, at the  
12 request of Developers, were made, for example, to the  
13 transportation plan. And the transportation plan doesn't  
14 really name any street at all. So there's no way that you can  
15 tell in looking at it where the given proposed street would be.  
16 Moreover, with regard to the development of the Peach Street  
17 Square shopping center, several roads, including what  
18 eventually ended up being Mandy Lane, were not only relocated  
19 but renamed.

20 Now, Developers has referenced from time to time --

21 I'm sorry, I don't have this exhibit in front of me, an  
22 ordinance which was enacted at one point at Developers request  
23 in connection with the whole Mandy Lane situation. Well, the  
24 fact of the matter is the effect of that ordinance was not  
25 reflected in the revised transportation plan until three years

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1 after the fact, and after all these events had occurred. The  
2 declared default and everything else. And also with any notice  
3 for any amendment to the transportation plan that does not go  
4 to the individual property owners, like a Zemenco or  
5 Zafiropoulos, it's simply published and will simply state that  
6 the township proposes or is proposing, among other things, an  
7 amendment to its transportation plan without identifying what  
8 that amendment is.

9 MR. DELANEY: May I interrupt just a moment. We do  
10 have a difference as to why, whether Mr. Zafiropoulos, Zemenco  
11 knew when they entered into the agreement, their intent to  
12 connect Mandy Lane to Downs Drive. Who cares. I mean for  
13 purposes of argument, let's assume that he never contemplated  
14 it. We got to go back to paragraph 20 of the agreement, which

15 is attached to the complaint. Which says under (a), if

16 purchaser --

17 THE COURT: Nick Scott?

18 MR. DELANEY: Was originally Nick Scott or his

19 assignee. If purchaser defaults, you get to keep deposit.

20 There's no other recourse. Now, someone had typed in here

21 thinking there are liquidated damages, an issue where you can

22 get some curious results.

23 THE COURT: Unfair results sometimes.

24 MR. DELANEY: Unfair results. But those unfair

25 results are typically when --

17

1 THE COURT: A defaulting party gets named.

2 MR. DELANEY: A defaulting party gets named for

3 paying for more than what is the real damage. I would submit

4 what we do is file dispositive motions, argue this. Look,

5 there isn't a liquidation clause, it's a limitation of damage

6 clause. And in that particular case they are not disfavored by

7 the courts, limitation of damage clauses are generally upheld.

8 They're not given the same scrutiny as liquidated damage

9 clauses are and this is enforceable.

10 MR. REIF: This is not a situation where Developers  
11 took the position that we defaulted. They declared a default  
12 by my client.

13 MR. DELANEY: Let me just respond to that. The  
14 letter says that this is terminated for -- among the reasons  
15 for which it is terminated, which you've defaulted. But it's a  
16 termination.

17 THE COURT: Let me say this, I want to ask some more  
18 general questions, but I appreciate this background. This is  
19 kind of like the old story about the guy with a bandana across  
20 his eyes feeling the legs of an elephant trying to figure out  
21 what he's dealing with. I'm touching every tree in the forest,  
22 I'm not above it yet so I can get the picture. Let me now try  
23 to do that. In terms of, I am always instinctively reluctant  
24 to stay a case unless I know that there are good prudential  
25 reasons to do it, and that nothing in the meantime can be

1 occurring here that materially advances my case, either by way  
2 of full or partial disposition, that's the first question for

3 you. And let me just say this. Instinctively, particularly  
4 given this long winding road of condemnation, I am unwilling to  
5 stay this case. I think I'm unwilling to stay this case, if  
6 someone can suggest to me that something productive can go on  
7 here even while that thing is going on here. Here's my  
8 question. And the question of timeframes came up. Well, I'm  
9 in charge of timeframes. When people file things and I take a  
10 more pragmatic approach to it, my question is this. Would  
11 either of you, I think I've heard from Mr. Delaney -- Mr. Reif,  
12 would it be your intention, if given the opportunity, on behalf  
13 of your client to file either a full or partial summary  
14 judgment motion with me?

15 MR. REIF: Would it be my intention to do that, your  
16 Honor?

17 THE COURT: Yes, sir.

18 MR. REIF: No, your Honor. What we had planned on  
19 doing and, again, my thought would be, our thought would be to  
20 file our pretrial statement, to file an expert's report that  
21 would elucidate these damage issues that we've been talking  
22 about. My suggestion, which I think would be practical in  
23 terms of moving this case forward, would be that Mr. Delaney do  
24 the same thing. At that point we should have at least the

25 initial decision from the Board of View in the next few months.

19

1 And depending on what that is, my thought, just from a  
2 pragmatic standpoint, since Developers, whatever the tab is  
3 going to be, is going to be paying it.

4 THE COURT: By the way, their indemnity agreement  
5 requires you to pay the freight, not only the legal fees, but  
6 also will require you to pay any judgment, if you will, that  
7 the Board of Viewers enters?

8 MR. DELANEY: My understanding is, I'm not a party,  
9 I'm not privy to that agreement, I didn't negotiate it, I don't  
10 represent DDR on that aspect. But Tim Sennett is representing  
11 the township. I have the impression that if the Board of  
12 Viewers were to come back and say, well, you know, it's  
13 \$387,000, DDR is going to pay the 100, they're going to  
14 reimburse Summit Township for Tim Sennett's work.

15 THE COURT: Where does that leave us, we're only  
16 about \$3.5 million short?

17 MR. REIF: My thought is, your Honor, perhaps at  
18 that point, which is a few months down the road, then we could



19 sit down and revisit these issues and see if there is anyway we  
20 can resolve everything. If we can't --

21 THE COURT: I'm not disparaging the approach out of  
22 the box, but it doesn't strike me as productive or practical,  
23 and I'll tell you why. Let me come back to this question about  
24 summary judgment motions. If you're right on your liquidated  
25 damage clause, then that's the end of the ball game, isn't it?

20

1 MR. DELANEY: Unless they provide a fraud  
2 inducement -- convince you there is a privilege there.

3 THE COURT: Trims the sails off the case somewhat.  
4 I'm not suggesting you are, but if you are right, doesn't that  
5 reconfigure this case somewhat, wouldn't that even be --  
6 whether he's successful or not, either way, isn't that an  
7 inducement at that point to further settlement discussions?

8 MR. DELANEY: Yes, it is from my standpoint.

9 THE COURT: What do you think, Mr. Reif, from this  
10 standpoint of moving my case, I'm not getting much out of this,  
11 it seems to me. It is unlikely, and you can correct me, either  
12 of you if I'm wrong, but it is unlikely the Board of Viewers

13 conclusion is going to be astronomically higher than what  
14 Sammartino already did. So all you're going to end up with, if  
15 it's not appealed, is another 100 or 200 grand in your pocket,  
16 at which point the lay of the land will be precisely the same  
17 way it is before me right now, except there would have been no  
18 motion practice and nothing would have happened over here.  
19 Now, let's go off the record here.

20 (Discussion held off the record.)

21 THE COURT: Look it, I'm looking at the amended case  
22 management order. So discovery closed on October 31st it looks  
23 like?

24 MR. REIF: That's correct.

25 THE COURT: Did you complete your discovery, Pat,

21

1 essentially?

2 MR. DELANEY: We did. We went beyond that deadline,  
3 but we got it done.

4 THE COURT: So discovery is done.

5 MR. REIF: Again, your Honor, the only thing I would  
6 say, for what it's worth, that of course from client's

7 standpoint, there is no question at trial Mr. Delaney could  
8 file a motion for a directed verdict, that type of thing. I  
9 think it's certainly prejudicial to have gone by that November  
10 20th deadline and now talk about Developers filing a motion for  
11 summary judgment.

12 MR. DELANEY: Judge, it absolutely is not  
13 prejudicial to them. If you adjust the schedule, there's  
14 nothing that's happened in the interim. The plaintiff's have  
15 known of these defenses from the outset.

16 MR. REIF: There is no question about that, I'm  
17 simply saying, your Honor, if the deadline is upheld, that I  
18 get to a jury if the case is not settled.

19 THE COURT: Well, if that deadline is not upheld and  
20 they lose their summary judgment motion, you still get to a  
21 jury, it seems to me. Look it, this is what I'm going to do.  
22 I take it implicitly that what the defendant is asking for is  
23 an extension of time on the pretrial schedule?

24 MR. DELANEY: Right.

25 THE COURT: I'm inclined to grant that. But I'm not

1 inclined to grant much. Now, we're right smack in the holiday  
2 period. You file, if you're going to do it -- your motion and  
3 supporting brief in 30 days. And then, Mr. Reif, you've got 30  
4 days, it's more than I normally give, he's got 30 days to move,  
5 I'm going to give you 30 days to respond to any motion. I'm  
6 not even going to order the timing on the filing of pretrials  
7 right now, it's premature, I'll just wait and see what happens.  
8 I'm not going to get an order out on that, frankly, because  
9 it's one less logistical thing, I'm without my deputy clerk  
10 right now. All right, let's go off the record.

11 (Discussion held off the record.)

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13 (Whereupon, at 9:45 a.m., the proceedings were  
14 concluded.)

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## 1 CERTIFICATE

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4 I, Ronald J. Bench, certify that the foregoing is a

5 correct transcript from the record of proceedings in the

6 above-entitled matter.

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11 Ronald J. Bench

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